

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20486
(Summary Calendar)

ERBEY FLORES,

Plaintiff-Appellant,

versus

DAVID M. JONES, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court
For the Southern District of Texas
(CA-H-93-3326)

(October 25, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Erbey Flores, a prisoner, appeals the district court's Fed. R. Civ. P. 41(b) dismissal of his civil rights complaint against prison officers. For the reasons set

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

forth below, we vacate the order of dismissal and remand this case to the district court.

I

FACTS AND PROCEEDINGS

On October 20, 1993, Flores filed a 42 U.S.C. § 1983 complaint, pro se and in forma pauperis (IFP), alleging, among other things, that he was assaulted by prison officers on October 24, 1992, "for no apparent reason." On January 26, 1994, the district court required Flores to submit, in the form of answers to interrogatories, a more definite statement of the facts upon which his complaint was based. The court's order specifically provided that "(f)ailure to comply as directed may result in the dismissal of this action." (emphasis in original).

On June 15, 1994, the court entered an order of dismissal under Fed. R. Civ. P. 41(b) based on Flores's failure to pursue his action. The dismissal was without prejudice and Flores was advised "that upon a proper showing, relief from this order may be granted in accordance with Fed. R. Civ. P. 60(b)." Final judgment was also entered on June 15, 1994.

On June 27, 1994, Flores filed a notice of appeal. On June 29, 1994, Flores filed a Fed. R. Civ. P. 59(e) motion for "Relief From Judgment,"¹ stating that he had mailed the required "Answers

¹Although Flores labeled his motion as a Fed. R. Civ. P. 60(b) motion, it is effective as a Rule 59(e) motion because it calls into question the correctness of the June 15 judgment and was filed within 10 days after the date of entry of that judgment. See Craig v. Lynaugh, 846 F.2d 11, 12-13 (5th Cir. 1988) (if the complaint was dismissed before service of process and "[i]f a judgment has been entered, a Rule 59(e) motion, or its legal equivalent, filed

to Interrogatories" on February 19, 1994. In support of this contention, Flores supplied a balance sheet for his inmate trust-fund account showing that a withdrawal for \$2.83 in postage had been made on February 22, 1994. Flores also filed on June 29th a copy of the "Answers to Interrogatories" he claimed to have filed in February.

On July 20, 1994, the district court entered an order denying Flores's motion for relief from judgment but granting his motion to proceed on appeal IFP. Flores filed a timely notice of appeal from this order on August 11, 1994.

II

ANALYSIS

Flores's notice of appeal from the denial of his Rule 59(e) motion brings up the underlying judgment for review. See United States v. One 1988 Dodge Pickup, 959 F.2d 37, 41 n.5 (5th Cir. 1992). Thus, notwithstanding Flores's attempts to argue other matters on appeal, the sole issue presented to us for review is the district court's dismissal for failure to prosecute.

Under Fed. R. Civ. P. 41(b), a district court may dismiss an action sua sponte, or on the motion of a defendant, for failure to prosecute. Berry v. CIGNA/RSI-CIGNA, 975 F.2d 1188, 1190 (5th Cir. 1992). Although the district court dismissed Flores's complaint without prejudice, the dismissal operates as a dismissal with

within 10 days after the date of entry of judgment is timely even though it has not been served on the defendants"); see also Fed. R. Civ. P. 6(a) (because period to file a motion under Rule 59(e) is less than 11 days, intermediate Saturdays and Sundays are excluded from the computation of the 10-day filing period).

prejudice if Flores would be barred by the applicable limitations period from filing a new complaint. Federal courts apply state personal injury limitations periods to actions under 42 U.S.C. § 1983. Owens v. Okure, 488 U.S. 235, 251, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989). The applicable Texas limitations period is two years. Burrell v. Newsome, 883 F.2d 416, 418 (5th Cir. 1989). As the earliest incident mentioned in Flores's complaint is the alleged assault of October 24, 1992, this claim will be time-barred by the time mandate issues. Thus, the dismissal is properly analyzed as one with prejudice.

We review a dismissal with prejudice for failure to prosecute for abuse of discretion. Berry, 975 F.2d at 1191. Ordinarily we will affirm a dismissal with prejudice only "(1) upon a showing of 'a clear record of delay or contumacious conduct by the plaintiff' and (2) when lesser sanctions would not serve the best interests of justice." Sturgeon v. Airborne Freight Corp., 778 F.2d 1154, 1159 (5th Cir. 1985) (emphasis original) (citations omitted). Dismissal with prejudice is "[t]he ultimate sanction for the litigant," and "should be imposed only after full consideration of the likely effectiveness of less-stringent measures." Hornbuckle v. Arco Oil & Gas Co., 732 F.2d 1233, 1237 (5th Cir. 1984), cert. denied, 475 U.S. 1016 (1986). Thus, we will not affirm the dismissal on the basis of "a silent record." McNeal v. Papasan, 842 F.2d 787, 793 (5th Cir. 1988).

The instant record does not clearly evince deliberate delay or contumacious conduct on the part of Flores. In his motion for

"Relief From Judgment," Flores stated that he had mailed the required "Answers to Interrogatories" within the period prescribed by the district court, and he attempted to verify this contention by providing the court with a balance sheet for his inmate trust-fund account. Flores also refiled the "Answers to Interrogatories."

Furthermore, the record does not reflect that the district court considered any alternative lesser sanction prior to dismissing the suit. Under the circumstances, the district court's dismissal constitutes an abuse of discretion, requiring us to vacate the order of dismissal and remand the action for further proceedings consistent with this opinion.

VACATED and REMANDED.